

No. 12429

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United States  
Court of Appeals  
For the Ninth Circuit.

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HUDSON LUMBER COMPANY, a Corporation,  
and ELKINS SAWMILL INCORPORATED,  
Appellants,

vs.

UNITED STATES PLYWOOD CORPORATION  
and SHASTA PLYWOOD, INC.,  
Appellees.

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Transcript of Record

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Appeal from the United States District Court,  
Northern District of California,  
Southern Division.

FILED

FEB 2 - 1950

PAUL P. O'BRIEN,

CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS  
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Attorneys for Plaintiffs and Appellants.

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Attorneys for Defendants and Appellees.

In the District Court of the United States for  
the Northern District of California, Southern  
Division

No. 29100H

HUDSON LUMBER COMPANY, a Delaware cor-  
poration, and ELKINS SAWMILL INCOR-  
PORATED, a California corporation,  
Plaintiffs,

vs.

UNITED STATES PLYWOOD CORPORATION,  
a New York corporation, and SHASTA PLY-  
WOOD, INC., a Nevada corporation, FIRST  
DOE, SECOND DOE, and FIRST DOE COM-  
PANY, a corporation,

Defendants.

PETITION FOR REMOVAL OF CIVIL AC-  
TION FROM THE SUPERIOR COURT OF  
THE STATE OF CALIFORNIA, IN AND  
FOR THE COUNTY OF ALAMEDA, TO  
THE DISTRICT COURT OF THE UNITED  
STATES, FOR THE NORTHERN DIS-  
TRICT OF CALIFORNIA, SOUTHERN  
DIVISION

To the Honorable Judges of Said District Court of  
the United States:

Your petitioners, United States Plywood Corpo-  
ration, a New York corporation, and Shasta Ply-  
wood, Inc., a Nevada corporation, the defendants  
above named, respectfully show:



I.

That a civil action has been brought and is now pending in the Superior Court of the State of California in and for the County of Alameda, a state court, wherein Hudson Lumber Company, a Delaware corporation, and Elkins Sawmill Incorporated, a California corporation, are plaintiffs and your petitioners are defendants, which action is designated by general No. 220984, and is hereinafter sometimes referred to as "said action No. 220984."

II.

That said action No. 220984 is a civil action for a declaratory judgment and injunction, and the matter in controversy, at the commencement of said action and at the present time, exceeds the sum or value of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs.

III.

That petitioners hereby petition to remove said action No. 220984 to this court upon the ground and for the reason that said civil action is one of which the District Courts have original jurisdiction and none of the parties in interest, properly joined and served as defendants, is a citizen of the State of California; that at the time of the commencement of this action, and at all times since, the defendant United States Plywood Corporation was a corporation organized and existing under the laws of the State of New York, and defendant Shasta Plywood,

Inc. was a corporation organized and existing under the laws of the State of Nevada, and neither of said defendants was, or is a citizen or resident of California; that the defendant First Doe, Second Doe and First Doe Company, a corporation, are fictitious names and no service of process has been had upon them. That at the time of commencement of this action and all times since, the plaintiff Hudson Lumber Company was a corporation organized and existing under the laws of the State of Delaware, and plaintiff Elkins Sawmill Incorporated was a corporation organized and existing under the laws of the State of California.

#### IV.

That a copy of the initial pleading setting forth the claim for relief upon which such action is based, together with Summons, was first received by the defendants, United States Plywood Corporation, a New York corporation, and Shasta Plywood, Inc., a Nevada corporation, through service upon them on August 8, 1949. A copy of said Summons and of said Complaint is attached hereto as Exhibit "1," and is hereby made a part of this petition.

#### V.

Your petitioners herewith present a good and sufficient bond, as provided by the statute, conditioned that your petitioners, the defendants United States Plywood Corporation, a New York corporation, and Shasta Plywood, Inc., a Nevada corpora-

tion, will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

Wherefore, petitioners pray that the said action No. 220984 be removed from said state court into this court for trial and determination; that this court accept said bond and make and enter an order of removal of said action No. 220984, and that the court make and enter such other and further orders as may be proper and necessary in the premises.

McMICKEN, RUPP &  
SCHWEPPE,

/s/ M. A. MARQUIS.

PILLSBURY, MADISON  
& SUTRO,

/s/ EUGENE M. PRINCE.

Of Counsel for Defendants, Petitioners, United States Plywood Corporation and Shasta Plywood, Inc.

State of Washington,  
County of King—ss.

W. C. Bailey, being first duly sworn, says: That he is Vice President of United States Plywood Corporation and President of Shasta Plywood, Inc., the above-named petitioners, and makes this verification on their behalf; that he has read the fore-

going petition, and that the allegations therein are true of his own knowledge.

/s/ W. C. BAILEY.

Subscribed and sworn to before me this 25th day of August, 1949.

[Seal] /s/ JANE CARMODY,

Notary Public in and for the State of Washington,  
residing at Seattle.

EXHIBIT NO. 1

Superior Court of the State of California in and  
for the County of Alameda

Department No. . . . .

Action No. 220984

038329

HUDSON LUMBER COMPANY, a Delaware corporation,  
and ELKINS SAWMILL INCORPORATED, a California corporation,

Plaintiffs,

vs.

UNITED STATES PLYWOOD CORPORATION,  
a New York corporation, and SHASTA PLYWOOD,  
INC., a Nevada corporation, FIRST DOE,  
SECOND DOE, and FIRST DOE COMPANY,  
a corporation,

Defendants.

SUMMONS

The People of the State of California to United  
States Plywood Corporation, a New York corporation,  
and Shasta Plywood, Inc., a Nevada corporation,  
First Doe, Second Doe and First Doe Company,  
a corporation, Defendants.

You are hereby directed to appear and answer the  
complaint filed in the County of Alameda in an  
action entitled as above, brought against you in the  
Superior Court of the State of California in and

for the County of Alameda, within ten days after the service on you of this summons — if served within said County, or within thirty days if served elsewhere.

You are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint as arising upon contract, or will apply to the court for any other relief demanded in the complaint.

Witness my hand and the seal of the Superior Court of the State of California in and for the County of Alameda this 4th day of August, 1949.

G. E. WADE,

Clerk.

By FRANK SCHNEPPLE,

Deputy.

BRUNER & GILMORE,

McKEE, TASHEIRA & WAHR-

HAFTIG, RIDLEY STONE,

Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 4, 1949.

G. E. WADE,

County Clerk,

By FRANK SCHNEPPLE,

Deputy.



In the Superior Court of the State of California  
in and for the County of Alameda

038329

No. 220984

HUDSON LUMBER COMPANY, a Delaware corporation, and ELKINS SAWMILL INCORPORATED, a California corporation,  
Plaintiffs,

vs.

UNITED STATES PLYWOOD CORPORATION, a New York corporation, and SHASTA PLYWOOD, INC., a Nevada corporation, FIRST DOE, SECOND DOE, and FIRST DOE COMPANY, a corporation,  
Defendants.

COMPLAINT FOR DECLARATORY RELIEF  
AND FOR INJUNCTION

Plaintiffs above named complain of defendants above named and each of them, and for cause of action allege as follows:

I.

Plaintiff Hudson Lumber Company is now and was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Delaware, and has duly qualified to do business in the State of California and

has its principal place of business in the County of Alameda, State of California.

## II.

Plaintiff Elkins Sawmill Incorporated is now and was at all times herein mentioned a corporation organized and existing under the laws of the State of California, and has its principal place of business in the County of Alameda, State of California.

## III.

Defendant United States Plywood Corporation is now and was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of New York, and is duly qualified to do business in the State of California.

## IV.

Defendant Shasta Plywood, Inc. is now and was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Nevada, and is duly qualified to do business in the State of California.

## V.

The names First Doe, Second Doe and First Doe Company, a corporation, are fictitious. The true names of said fictitiously named defendants are unknown to plaintiffs. When the true names of any of said defendants are ascertained plaintiffs will,



by leave of Court, insert such true names in the record of this action with the allegations to charge them.

VI.

On December 9, 1947, the defendant United States Plywood Corporation entered into a contract in writing with plaintiff Hudson Lumber Company, a true copy of which is attached hereto, marked "Exhibit A," referred to hereby, and by such reference incorporated herein.

VII.

In and by said contract said parties agreed, among other things, that said defendant would sell and deliver to said plaintiff, and said plaintiff would buy and pay for all merchantable incense cedar logs derived from a certain tract mentioned in said contract, upon which said defendant had lately acquired the outright purchase and cutting rights to timber (referred to in said contract as the La Tour Timber). Said contract provided, among other things, that the merchantability of said logs should be determined in the manner specified in the cutting contract referred to therein between said defendant and La Tour Peak Timber Company, dated May 21, 1947, a copy of the provision of which relating to merchantability of logs is attached hereto, marked "Exhibit B," referred to hereby, and by such reference incorporated herein.

## VIII.

In and by said contract between said plaintiff and said defendant (Exhibit A) it was further provided, among other things, that said plaintiff should pay for said incense cedar logs the actual cost of such logs, as further defined in said contract, plus ten per cent (10%) of such cost.

## IX.

The definition of such cost, as further contained in said contract, included among other items the following:

“The actual cost to Harbor and U. S. Plywood of falling, bucking, yarding, loading, sorting, scaling and transporting logs to Anderson, California, or such other place near Anderson as Hudson may direct, whether done by Harbor or U. S. Plywood or under contract by an independent logger or loggers, provided that the destination of Hudson’s logs shall be substantially adjacent to the destination of the remaining logs cut from the La Tour timber; and provided, further, that no logging or road-building profit of any Company which is a subsidiary of or affiliated with Harbor or U. S. Plywood shall be allowed in computing Hudson’s Cost hereunder.”

\* \* \*

“With the exception of the stumpage charge payable pursuant to subdivision (i) hereof, logging costs, as hereinabove defined, shall be computed on a common cost per M ft. for all species derived from

the La Tour timber and this common cost will be the cost per M ft. of cedar logs delivered to Hudson hereunder.”

X.

The parties thereupon commenced operations under said contract and have continued and now carry on the same. Said plaintiff Hudson Lumber Company has caused the plaintiff Elkins Sawmill Incorporated to receive deliveries of said cedar logs under said contract and to pay for the same; and said plaintiff Elkins Sawmill Incorporated has an interest in the subject matter of the contract, and is a party in interest in the controversy hereinafter set forth.

Plaintiffs are informed and believe and upon such information and belief allege that Harbor Plywood Corporation, mentioned in said contract as a party in interest therein with United States Plywood Corporation, has relinquished or abandoned its interest in said contract, and that said defendant United States Plywood Corporation has assumed the management of operations thereunder, and that, by reason thereof, pursuant to the provisions of Article 3 (e) of said contract, said defendant has been substituted for said Harbor Plywood Corporation as the party in interest thereunder.

Plaintiffs are further informed and believe, and upon such information and belief allege, that defendant Shasta Plywood, Inc. has acquired some

part of the seller's interest under said contract, but the exact nature and extent of the interest so acquired, and the exact manner of its acquisition by said Shasta Plywood, Inc. is unknown to plaintiffs.

## XI.

An actual controversy has arisen and now exists, between the plaintiffs on one side and the defendants on the other, as to the meaning and effect and application of the above quoted provisions of said contract relating to the measuring and scaling of the logs and the method of computing and determining the cost of said cedar logs.

Plaintiffs contend that the "common cost" therein referred to, of all species derived from the La Tour timber should, under the true meaning of said provision, be computed on the net scale of all the logs of all species, after deduction and allowance for all visible defects as set forth in said cutting contract.

Defendants contend that such "common cost," under the true meaning of said provision, should be computed on the gross scale of all logs of all species, before deduction and allowance for said defects.

## XII.

As at the date of the filing of this Complaint, the difference in the amount which plaintiffs are required to pay under said differing and disputed constructions of said provisions, amounts to upwards of \$35,000.00, and will steadily increase throughout the life of said contract so long as the timber cutting operations continue.

## XIII.

Plaintiffs are ready, able and willing to pay the correct amount due for the cedar logs delivered and to be delivered to them; but the parties have been unable to agree as to the computation of such amount. As the operations under said contract continue, the amount of the difference between the parties will increase, and plaintiffs are faced with the dilemma of (1) either paying the amounts claimed by the defendants, which are and will continue to be substantially larger than the amounts contended by said defendants to be owing by them; or (2) being at the hazard of being in default under said contract, with the consequent danger of cancellation by defendants, and forfeiture of plaintiffs' rights under said contract, or of a large, undetermined and contingent liability of plaintiffs in the additional amount claimed and to be claimed by defendants, which will make impossible the rendition of proper and reliable statements, the keeping of proper, correct and reliable records, and the rendition of proper and correct tax returns and statements to the United States Government and other taxing authorities.

## XIV.

Irreparable injury will occur to plaintiffs unless the rights and duties of the parties under said contract and said quoted provisions thereof are determined, in that plaintiffs face the hazard of forfeiture of their rights under the contract, with



consequent loss of their large investment in saw-mill facilities in the vicinity of the timber supply, as well as loss of an assured supply of timber for upwards of twelve years.

There is also the danger multiplicity of actions faced by plaintiffs unless said controversy is determined; in that they face the hazards of: (1) demand by defendants for arbitration under the arbitration provision of said contract hereinafter referred to; (2) proceedings to compel such arbitration; (3) an action or actions to declare terminated the rights and interests of plaintiffs under said contract; (4) an action or successive actions by defendants or one of them to recover the additional amounts claimed by them to be due; (5) an action or successive actions for damages by defendants against plaintiffs, by reason of the claim by defendants that plaintiffs will have breached the contract; (6) other and incidental controversies and litigation over tax liability that will hinge upon the determination of this dispute.

By reason of the facts above stated, this is a proper case for relief in equity, by injunction.

## XV.

In said contract it is provided among other things as follows:

“It is hereby agreed that in case any disagreement or difference shall arise at any time hereafter between either of the parties hereto in relation to

this agreement, either as to the construction or operation thereof, or the respective rights and liabilities thereunder, such disagreement shall be submitted to arbitration in the State of California, pursuant to the Rules of the American Arbitration Association as then in effect, but nothing herein shall be deemed to preclude either party from seeking injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement."

Defendants threaten to attempt to compel such arbitration proceedings, notwithstanding the said provision of said contract saving to the parties the right to seek injunctive relief. If plaintiffs are compelled to proceed to such arbitration they will be denied their day in court and the expressly reserved right to injunctive relief to prevent irreparable injury by reason of a claimed breach of the contract, and will thereby be irreparably injured by being forced to accept the award of arbitrators rather than the decree of a court of equity after a hearing and determination according to law.

#### XVI.

Plaintiffs are ready, able and willing and hereby offer to do equity, and perform the contract as the same may be interpreted by the Court herein.

Wherefore, plaintiffs pray the decree of the above-entitled Court determining and declaring the rights and duties of the parties under said contract, and particularly the true meaning, effect and application

of the said quoted provisions thereof with respect to the definition of actual cost of said logs, and settling and determining said controversy; and that defendants and each of them be enjoined from: (1) commencing other actions or proceedings pending determination of this action, to enforce or recover their claimed rights under the matter in controversy; (2) proceeding or attempting to proceed to arbitration or to compel plaintiffs to submit thereto; (3) cancelling or attempting to cancel or declare forfeit the rights and interests of the plaintiffs under said contract by reason of any claimed default resting in defendants' contentions as to the matter in controversy, above set forth; and for plaintiffs' costs, and for such other and further relief as may be meet and proper and in accordance with equity.

BRUNER & GILMORE,  
McKEE, TASHEIRA & WAHR-  
HAFTIG, RIDLEY STONE,  
Attorneys for Plaintiffs.

State of California,  
County of Alameda—ss.

Francis M. Neall, being first duly sworn, deposes and says: That he has read the foregoing Complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated on his information



and belief, and as to those matters he believes it to be true. That said affiant is an officer of the plaintiff Elkins Sawmill Incorporated, a corporation, to-wit, its President; that he has charge and knowledge of the business thereof, and that he makes this affidavit and verification on behalf of said plaintiff.

FRANCIS M. NEALL.

Subscribed and sworn to before me this 4th day of August, 1949.

[Seal] J. D. COOPER,  
Notary Public in and for the County of Alameda,  
State of California.

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Exhibit "A" to Exhibit No. 1

Agreement made and entered into this 9th day of December, 1947, by and between United States Plywood Corporation, a New York corporation with its principal office at 55 West 44th St., New York City, New York (hereinafter sometimes called "U. S. Plywood") and Hudson Lumber Company, a Delaware corporation with its principal office at San Leandro, California (hereinafter sometimes called "Hudson")—

Witnesseth:

Whereas, U. S. Plywood, in conjunction with Harbor Plywood Corporation, a Delaware Corporation, hereafter referred to as "Harbor," has acquired approximately 1,000,000,000 feet of timber

(pine, incense cedar and other species) located in Shasta County, California, a portion of said timber being under outright purchase agreement subject to a deed of trust, and a portion under what is commonly known as a cutting contract (all of said timber is hereafter sometimes referred to as the "La Tour timber"); a copy of said cutting contract, included in the option agreement and cutting contract entered into on October 29, 1947, between Louise Defenbacher et al, as Seller, and La Tour Peak Timber Company, a California Corporation, and Harbor, has been delivered to and is in possession of Hudson and shall be deemed a part of the agreement; and

Whereas, U. S. Plywood has acquired from Harbor a one-half interest in the La Tour Timber and has agreed with Harbor upon the joint logging thereof, which logging operations will, subject to certain conditions, be done under Harbor's supervision; and

Whereas, pursuant to agreement between Harbor and La Tour Peak Timber Company, dated May 21, 1947, Harbor and U. S. Plywood are required to pay to La Tour Peak Timber Company, in addition to the stumpage charge specified in the afore-said contract, an overriding royalty on incense cedar of 50c per m; and

Whereas, Hudson desires to purchase and U. S. Plywood desires to sell all of the incense cedar derived from the La Tour timber;

Now, therefore, for and in consideration of the sum of One (\$1.00) Dollar and other good and valuable considerations by each of the parties to the other in hand paid, and the mutual covenants and conditions herein contained, it is mutually agreed as follows:

1. U. S. Plywood undertakes and agrees to perform all of the terms and conditions of the cutting contract and not to permit or suffer any default thereunder, and further undertakes and agrees not to permit or suffer any default under the deed of trust securing the payment of the balance of the purchase price due for the outright purchase.

2. (a) U. S. Plywood agrees to sell and deliver to Hudson, as same are logged, and Hudson agrees to buy all merchantable incense cedar logs derived from the La Tour timber during the period hereinafter provided.

(b) The merchantability of logs shall be determined in the manner specified in the aforesaid cutting contract.

(c) Hudson shall pay for said logs Harbor's and U. S. Plywood's actual cost of such logs, as hereinafter defined, plus 10% of such cost.

3. (a) The cost of logs is defined, for the purpose of this contract, as the aggregate of the following items of expense of Harbor and U. S. Plywood.

(i) The stumpage charge payable by Harbor and U. S. Plywood for all cedar timber in the La

Tour timber computed on the basis set forth in the cutting contract above referred to, plus the amount of 50c per M ft.

(ii) The actual cost to Harbor and U. S. Plywood of falling, bucking, yarding, loading, sorting, scaling and transporting logs to Anderson, California, or such other place near Anderson as Hudson may direct, whether done by Harbor or U. S. Plywood or under contract by an independent logger or loggers, provided that the destination of Hudson's logs shall be substantially adjacent to the destination of the remaining logs cut from the La Tour timber; and provided, further, that no logging or road-building profit of any Company which is a subsidiary of or affiliated with Harbor or U. S. Plywood shall be allowed in computing Hudson's cost hereunder.

(iii) The proportionate cost per M ft. of all necessary logging roads;

(iv) In the event that Harbor and U. S. Plywood elect to contract the logging, U. S. Plywood shall be entitled to add as an item of cost, as herein defined, the actual expense of a superintendent and electrical assistants to oversee such logging operations.

(v) All other costs incident to (according to usual and accepted accounting practice) and properly chargeable to cost of logs, including (without being limited thereto) provision for fire fighting

and equipment for so doing, interest at the rate of 4% per annum on the deposit payment on the cutting contract and taxes;

(vi) With the exception of the stumpage charge payable pursuant to subdivision (i) hereof, logging costs, as hereinabove defined, shall be computed on a common cost per M ft. for all species derived from the La Tour timber and this common cost will be the cost per M ft. of cedar logs delivered to Hudson hereunder.

(b) U. S. Plywood agrees in cooperation with Harbor, to keep the cost of logging as low as possible consistent with sound operation.

(c) U. S. Plywood agrees to cause Harbor to keep and maintain books of account according to usual and accepted accounting practices, which shall reflect the cost as herein defined, said books to be open for inspection by Hudson.

(d) The cost of logs, as above defined, shall be tentatively determined each month by Harbor's accounting department and settlement made on such tentative determination within ten (10) days after receipt of Harbor's statement for all logs theretofore sold and delivered to Hudson. The cost of logs shall be finally determined by Price, Waterhouse & Co., certified public accountants (or such other independent certified public accountants as Harbor may select to make the annual audit of all its business and affairs) according to usual and accepted



accounting practice. Determination of all costs, other than stumpage charge, shall be made at the close of each calendar year. The determination of the stumpage charge shall be made when the same is established pursuant to the provisions of the cutting contract. Determination of cost of logs by said certified public accountants shall be final and binding upon the parties hereto. If such certified public accountants shall find a substantial variation from the tentative determination, they shall give both parties hereto an opportunity for conference and discussion before issuing their final written determination. Settlement between the parties for any balance due by one to the other shall be made within 20 days after the receipt of the accountant's final determination.

(e) Under the present agreement between Harbor and U. S. Plywood relative to the La Tour Timber, Harbor is charged with the management of operations thereunder. In the event that for any reason U. S. Plywood shall assume the management of such operation, then and in such event U. S. Plywood shall be substituted for Harbor wherever the name of Harbor appears in this paragraph and the accounting firm of Arthur Andersen & Co., or such other independent certified public accountants as U. S. Plywood may select to make the annual audit of all its business and affairs shall be substituted for Price, Waterhouse & Co. and for Harbor's independent certified public accounting firm.

(f) Subject to procuring the consent of La Tour

Peak Timber Company and the parties of the first part to the cutting contract to the amendment of the terms and provisions of the cutting contract necessary to permit same, which consent U. S. Plywood will endeavor in good faith to procure in cooperation with Hudson, Hudson may, from time to time, request that the falling of cedar trees in certain designated areas be deferred to permit adjustment of the in-pu<sup>t</sup> of logs to the productive capacity of its mill, until such time as the quantity of standing cedar, the cutting of which has been so deferred, aggregates 3,000,000 feet and no more, Hudson agrees that it will promptly pay the full price of the stumpage, the cutting of which is thus deferred, plus the override of 50c per M ft., and assume all carrying charges on the land upon which the cedar trees may be left. It shall be the right and obligation of Hudson to log and remove the cedar, the cutting of which is thus deferred, at its own cost and expense, prior to the expiration of Harbor's or U. S. Plywood's rights under the cutting contract or under the outright purchase contract as the case may be. Hudson assumes all responsibility for any damage to or deterioration of the trees, the cutting of which has been deferred pursuant to its request as above stated, and any loss suffered by reason of its failure to remove the timber.

4. Nothing herein shall be deemed to preclude U. S. Plywood from exercising any option to suspend operations under the cutting contract as permitted therein.

5. U. S. Plywood undertakes and agrees that all logging operations shall be carried out in a good and workmanlike manner, observing all the good usages and customs as practiced in the logging industry on privately owned lands in the locality, not inconsistent with the specific terms of the cutting agreement above referred to. All logging operations shall be carried out in a manner to comply with all governmental regulations in effect from time to time. U. S. Plywood undertakes and agrees that all logs delivered to Hudson hereunder shall be free from any and all claims, liens or demands of any nature whatsoever.

6. Each of the parties agrees to use its best efforts to coordinate their operations hereunder to their mutual advantage.

7. (a) All obligations and deliveries hereunder shall be subject to acts, requests or demands of the Government of the United States and of the State of California, including any municipal subdivision thereof, wherein such delivery or shipment is to be made, and of any qualified board, commission or bureau or department thereof, and all rules and regulations pursuant thereto adopted or approved by said government or by any such state, or by any such board, commission or bureau or department thereof.

(b) U. S. Plywood shall not be liable for delay, non-delivery or failure or inability to deliver logs hereunder occasioned by acts of God, war, civil



commotions, fire, earthquakes, floods, snow, storms, strikes, lockouts or labor disturbances, or from any other cause whatsoever whether similar to the foregoing or not, beyond its control.

(c) If by reason of the happening of any of the events enumerated in subdivision (b) hereof, or for any other cause whatsoever, beyond its control, Hudson's ability to accept delivery of logs or U. S. Plywood's ability to make delivery is interfered with, then and in such event, Hudson's obligation to accept and pay for logs shall not be affected, provided, however, that all such logs shall be cold-decked at some location in the timber adjacent to the highway with an appropriate adjustment for any decrease or increase in cost caused by such action and Hudson shall have the right to effect removal thereof at its own cost. In addition, upon the happening of such events, U. S. Plywood will, upon Hudson's request and subject to the consent of La Tour Peak Timber Company and the parties of the first part to the cutting contract, as specified in subdivision (f) of Clause "3" hereof (which U. S. Plywood will endeavor in good faith to procure in cooperation with Hudson) and subject to all of the terms and provisions of said subdivision (f) except the limitation as to the quantity of 3,000,000 feet, defer the cutting of cedar trees and will at all events take such actions as are legally and economically feasible to reduce the production of cedar logs. U. S. Plywood un-

dertakes and agrees that in the event that Hudson's ability to receive logs pursuant to this contract is interfered with by reason of any of the causes specified in subdivision (b) hereof, it will cooperate with Hudson to the fullest practicable extent so as to ameliorate Hudson's obligations hereunder, provided, however, that nothing herein shall be understood to impose upon U. S. Plywood the obligation to undertake a course of action which will impose loss or damage upon it.

(d) It is specifically understood and agreed that U. S. Plywood shall be relieved of all obligations hereunder in the event of the destruction of the La Tour timber by fire or otherwise during the terms of this agreement.

8. In the event that either of the parties hereto shall file a voluntary petition in bankruptcy or shall make an assignment for the benefit of creditors, or shall be adjudicated a bankrupt, or upon the filing of a voluntary or the approval of an involuntary petition for reorganization or arrangement under the National Bankruptcy Act, or in the event of the appointment of a receiver or a temporary receiver of either of the parties and the failure to vacate same within sixty (60) days after such appointment, then and in any such event the other party may terminate this agreement by notice to that effect and thereupon all obligations except the obligations of Hudson to make payment of any amount due hereunder shall cease.

9. Any waiver by any of the parties hereto of any breach of the provisions of this agreement shall be limited to such particular instance, and shall not operate as a waiver of or be deemed to waive any future breaches of any of such provisions.

10. It is hereby agreed that in case any disagreement or difference shall arise at any time hereafter between either of the parties hereto in relation to this agreement, either as to the construction or operation thereof, or the respective rights and liabilities thereunder, such disagreement shall be submitted to arbitration in the State of California, pursuant to the Rules of the American Arbitration Association as then in effect, but nothing herein shall be deemed to preclude either party from seeking injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement.

11. It is specifically understood and agreed that except with U. S. Plywood's written consent, Hudson shall not assign or transfer the whole or any portion of its rights hereunder, to any other person, firm or corporation, except to a wholly owned subsidiary or to Elkins Sawmill Incorporated, a California corporation. Such assignment, however, shall not release Hudson from the obligations assumed by it hereunder. Except with Hudson's written consent, U. S. Plywood shall not assign or transfer the whole or any portion of its rights hereunder to any other person, firm or corporation, except to a subsidiary of U. S. Plywood, or to a corporation con-

trolled by U. S. Plywood or by U. S. Plywood and Harbor, but such assignment shall not release U. S. Plywood from the obligations assumed by it hereunder.

12. This contract shall commence as of the date that Harbor or U. S. Plywood commences logging operations on the La Tour Timber and shall continue in full force and effect for the full term of the cutting contract hereinabove referred to and any extensions or renewal thereof, but in no event for more than twenty-five (25) years after the commencement of logging operations on the La Tour timber.

13. Any notice required or permitted to be given under the provisions of this contract shall be given as follows:

(a) To U. S. Plywood at 55 West 44th Street, New York City, New York, or such other address as it may from time to time in writing designate.

(b) To Hudson Lumber Company at its San Leandro Office, California, or such other address as it may from time to time in writing designate.

14. The execution, operation, performance and all other matters pertaining to this contract shall be construed under and governed by the laws of the State of California.

15. This contract shall be binding upon the parties hereto, their respective successors and assigns.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

UNITED STATES PLYWOOD  
CORPORATION,

By /s/ LAWRENCE OTTINGER,  
President.

HUDSON LUMBER  
COMPANY,

By /s/ FRANCIS M. NEALL,  
General Manager.

State of New York,

City and County of New York—ss.

On this 12th day of December, 1947, before me, John Pardo, a Notary Public in and for the City and County of New York, State of New York, residing therein, duly commissioned and sworn, personally appeared Lawrence Ottinger, known to me to be the President of United States Plywood Corporation, the corporation described in and that executed the within and foregoing Agreement and also known to me to be the person who executed the same on behalf of said corporation, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City



and County and State aforesaid, the day and year in this certificate first above written.

/s/ JOHN PARDO,  
Notary Public.

(Stamp) John Pardo, Notary Public, State of New York. Residing in Bronx County.

Commission expires March 30, 1949.

State of New Jersey,  
City of Jersey City, County of Hudson—ss.

On this 12th day of December, 1947, before me, G. H. Hubbard, a Notary Public in and for the County of Hudson, State of New Jersey, residing therein, duly commissioned and sworn, personally appeared Francis M. Neall, known to me to be the General Manager of Hudson Lumber Company, the corporation described in and that executed the within and foregoing Agreement and also known to me to be the person who executed the same on behalf of said corporation, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County and State aforesaid, the day and year in this certificate first above written.

/s/ G. H. HUBBARD,  
Notary Public.

(Stamp) G. H. Hubbard, Notary Public of New Jersey.

My commission expires June 17, 1951.

Form 1

No. 83407

State of New York,  
County of New York—ss.

I, Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County, a Court of Record having by law a seal, Do Hereby Certify That John Pardo whose name is subscribed to the annexed affidavit, deposition, certificate or acknowledgment or proof, was at the time of taking the same a Notary Public in and for the State of New York, duly commissioned and sworn and qualified to act as such throughout the State of New York; that pursuant to law a commission, or a certificate of his appointment and qualifications, and his autograph signature, has been filed in my office: that as such Notary Public he was duly authorized by the laws of the State of New York to administer oaths and affirmations, to receive and certify the acknowledgement or proof of deeds, mortgages, powers of attorney and other written instruments for lands, tenements and hereditaments to be read in evidence or recorded in this State, to protest notes and to take and certify affidavits and depositions; and that I am well acquainted with the handwriting of such Notary Public, or have compared the signature on the annexed instrument with his autograph signature deposited in my office, and believe that the signature is genuine.

In Witness Whereof, I have hereunto set my hand

and affixed my official seal this 16th day of Dec., 1947.

/s/ ARCHIBALD R. WATSON,  
County Clerk and Clerk of the Supreme Court,  
New York County.

Fee Paid 25c.

Form 2479

No. 9177

State of New Jersey,  
County of Hudson—ss.

I, W. H. Gilfert, Clerk of the County of Hudson aforesaid and also Clerk of the Circuit Court and Court of Common Pleas for said County, said Courts being Courts of Record, with a seal, do hereby certify that G. H. Hubbard the Notary Public before whom the within acknowledgement or affidavit was made, was at the time of taking the same commissioned and sworn, and residents in said County, and duly authorized by the laws of the State of New Jersey to take for record in said State all affidavits and all acknowledgements and proofs of deeds of conveyance for lands, tenements, and hereditaments, situate, lying and being in said State of New Jersey. And further, that I am well acquainted with the handwriting of such Notary Public, and verily believe the signature to said certificate of proof or acknowledgement is genuine. And, further, that said instrument is executed and acknowledged according to the laws of the State of New Jersey.



In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Courts and County the 17th day of December, 1947.

W. H. GILFERT,  
Clerk.

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EXHIBIT B TO EXHIBIT NO. 1

Merchantability: The minimum merchantable log shall be a log which is ten feet or longer (or eight feet or longer as provided in paragraph 10) plus trim allowance and which is twelve inches or more in diameter inside the bark at the small end or which is ten inches or more in diameter at the small end if the top log is a smooth type log containing small live knots, and which shall scale 50% or more merchantable, as defined hereinafter, after customary deductions have been made from gross scale for visible defects. Deduction in scale shall be made for unfirm red and blue stain, rot, wind-shake and split, but no deduction in scale shall be made for firm red and blue stain or heavy massed pitch. Deduction for rot in cedar logs shall be based on the average of the end-areas of the defect in each scaling length, rather than on the larger end-area alone as is customary in scaling pine and fir logs. No deduction in scale shall be made for defect, deterioration or loss in volume or value due to any cause or condition within the control of the buyer, and losses resulting to felled timber from fire shall be paid for by the buyer.

Where cutting experience demonstrates that certain types of defective trees cannot produce 25% or more of their gross volume in merchantable scale seller shall designate such trees as in seller's reasonable opinion cannot produce such volume, to be left standing at buyer's option and buyer shall not be required to fall them.

The term "merchantable," as herein used, shall be defined to mean that portion of the log from which lumber can be produced which is merchantable as defined in Standard Grading Rules, published by Western Pine Association, effective April 15, 1947, copy of which is attached hereto, marked Exhibit B, and hereby made a part hereof, grading Number 5 common or Box or better.

[Endorsed]: Filed August 26, 1949.

In the District Court of the United States for the  
Northern District of California Southern Division

No. 29100 H

HUDSON LUMBER COMPANY, a Delaware corporation,  
and ELKINS SAWMILL INCORPORATED, a California corporation,

Plaintiffs,

vs.

UNITED STATES PLYWOOD CORPORATION,  
a New York corporation, and SHASTA PLYWOOD, INC.,  
a Nevada corporation, FIRST DOE, SECOND DOE  
AND FIRST DOE COMPANY, a corporation,

Defendants.

MOTION TO DISMISS OR IN ALTERNATIVE  
TO STAY ACTION

I.

The defendants, United States Plywood Corporation and Shasta Plywood, Inc., move to dismiss the action on the ground that it appears on the face of the complaint:

1. That the complaint fails to state a claim upon which relief can be granted;

2. That the Court has no jurisdiction of the subject matter; in that this action has been brought by the above-named plaintiffs for the construction and determination of the rights and duties of the

parties under a written contract attached to plaintiffs' complaint as Exhibit "A", which contract contains an agreement in writing for arbitration covering issues as to the construction of said contract or the determination of the respective rights and liabilities thereunder, the provision thereof reading as follows:

"It is hereby agreed that in case any disagreement or difference shall arise at any time hereafter between either of the parties hereto in relation to this agreement, either as to the construction or operation thereof, or the respective rights and liabilities thereunder, such disagreement shall be submitted to arbitration in the State of California, pursuant to the Rules of the American Arbitration Association as then in effect, but nothing herein shall be deemed to preclude either party from seeking injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement."

## II.

In the alternative, in the event the motion to dismiss is not granted, the defendants, United States Plywood Corporation and Shasta Plywood, Inc., pursuant to the provisions of 9 U. S. C. A., Section 3, move for a stay of all proceedings in this action until arbitration can be had pursuant to said agreement and Sections 1280 to 1293 inclusive of California Code of Civil Procedure, on the grounds set forth in Paragraph I above.

III.

This motion will be based upon this notice, upon the complaint on file in this action and upon the affidavit of M. A. Marquis, one of counsel for defendants, hereto attached.

McMICKEN, RUPP &  
SCHWEPPE,

/s/ M. A. MARQUIS,  
PILLSBURY, MADISON &  
SUTRO,

/s/ EUGENE M. PRINCE,  
Of Counsel for Defendants, United States Plywood  
Corporation and Shasta Plywood, Inc.

NOTICE OF MOTION

To Bruner & Gilmore and McKee, Tasheira & Wahrhaftig, Ridley Stone, Attorneys for Plaintiffs:

Please take notice that the undersigned will bring the above motion on for hearing before this court at Room 276, United States Post Office and Court-house Building, San Francisco, California, on the 19th day of September, 1949, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

McMICKEN, RUPP &  
SCHWEPPE,

/s/ M. A. MARQUIS,  
PILLSBURY, MADISON &  
SUTRO,

/s/ EUGENE M. PRINCE,  
Of Counsel for Defendants, United States Plywood Corporation and Shasta Plywood, Inc.

Service of the within and foregoing motion with attached affidavit, proposed draft of orders and statement of reasons in support of motion admitted at Oakland, California, this . . . . day of . . . . ., 1949.

.....,  
Of Counsel for Plaintiffs.



State of Washington,  
County of King—ss.

M. A. Marquis, being first duly sworn, on oath deposes and says:

That he is one of counsel for defendants, United States Plywood Corporation and Shasta Plywood, Inc., in the above-entitled matter; that this affidavit is made in support of motion to dismiss this action or in alternative to stay action, to which motion this affidavit is attached;

That plaintiffs have made no demand or request for arbitration in accordance with the provisions of the arbitration clause in the contract involved in this action, which arbitration clause is set forth in full in said motion and, in fact, the plaintiffs have affirmatively alleged in their complaint that "defendants threatened to compel arbitration proceedings" and the plaintiffs seek to enjoin such proceedings; that the defendants, United States Plywood Corporation and Shasta Plywood, Inc., are ready and willing to proceed with arbitration of the issue involved in this proceeding:

That, as alleged in plaintiffs' complaint, Harbor Plywood Corporation, has relinquished all interest in the timber which is the subject of the contract attached to plaintiffs' complaint as Exhibit "A" and

Harbor Plywood Corporation is not now involved in said agreement in any manner.

/s/ M. A. MARQUIS.

Subscribed and sworn to before me this 29th day of August, 1949.

[Seal] /s/ JANE CARMODY,  
Notary Public in and for the State of Washington,  
residing at Seattle.

\_\_\_\_\_

[Title of District Court and Cause.]

ORDER DISMISSING ACTION

This Cause coming on to be heard on motion of defendants, United States Plywood Corporation and Shasta Plywood, Inc., for an order dismissing this action or in the alternative for an order staying proceedings in this action, and it appearing to the Court that said action involves an issue referable to arbitration under an agreement in writing for such arbitration, and plaintiffs have made no request or demand for such arbitration,

It Is Ordered that this action be and it is hereby dismissed.

Dated this ..... day of September, 1949.

.....,  
United States District Judge.

[Title of District Court and Cause.]

ORDER GRANTING STAY OF ACTION

This Cause came on to be heard on motion of defendants, United States Plywood Corporation and Shasta Plywood, Inc., for an order dismissing this action or in the alternative for an order staying proceedings in this action, and it appearing to the Court that said action involves an issue referable to arbitration under an agreement in writing for such arbitration, and that plaintiffs have made no request or demand for such arbitration;

It Is Ordered That this action be and it hereby is stayed, and that plaintiffs and their attorneys be and they hereby are stayed from taking further action in this case until arbitration has been had in accordance with the terms of the agreement between the parties hereinabove referred to.

Dated this ..... day of September, 1949.

.....,

United States District Judge.

[Endorsed]: Filed September 1, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF FRANCIS M. NEALL IN  
OPPOSITION TO MOTION OF DEFEND-  
ANTS TO DISMISS OR STAY

State of California, County of  
Alameda, Northern District of California—ss.

Francis M. Neall, being first duly sworn, deposes and says: I am President of Elkins Sawmill Incorporated, a corporation, one of the plaintiffs in the above entitled action. As such I made the affidavit of verification of the Complaint on file herein. I am the Manager of the plaintiff, Hudson Lumber Company, a corporation, and have charge of its office and yard at San Leandro, California, and am in direct charge of its business and operations. I personally participated in and carried on, and have knowledge of the negotiations leading up to the making of the contract between United States Plywood Corporation and Hudson Lumber Company, dated December 9, 1947, a true copy of which is attached to the Complaint in this action and marked "Exhibit A". I also participated in the drafting and discussion of the provisions of said contract. I also have personally participated in and have knowledge of the negotiations between the plaintiffs and defendants herein, prior to the commencement of this action, concerning the controversy between them which is referred to in said Complaint, as to the interpretation of said contract with regard to

the method of computing the actual cost of logs delivered to plaintiffs pursuant to said contract.

The price provided by said contract to be paid by the plaintiffs for the cedar logs purchased is based on the "cost" of the logs, and such "cost" includes, among other items, the actual logging cost of falling, bucking, yarding, loading, sorting, scaling and transporting logs to Anderson, California, or such other place near Anderson as said Hudson Lumber Company may direct. The contract further provides that such logging costs shall be computed on a "common cost" per 1000 feet for all species of logs derived from the timber tract referred to in the contract, and this "common cost" is to be the cost per 1000 feet of the cedar logs. The controversy between plaintiffs and defendants revolves about the point whether this "common cost" of all species should be computed on the net scale of all the logs of all species, after deduction and allowance for visible defects (as plaintiffs contend); or whether it should be computed on the gross scale of all the logs of all species, before deduction and allowance for visible defects. The reason why computing such common costs on a net scale makes a substantial difference from computing it on a gross scale, is that the different species of logs ordinarily have a different percentage or portion of visible defects, and that cedar logs have a higher percentage of such defects than other species. Therefore, the proportion of usable wood derived from cedar logs is less than that derived from other species. It follows



that any given total amount of logging costs, spread as a "common cost" over all species, will bear less heavily on the cedar logs if a net scale is used, than if a gross scale is used.

During the negotiations leading up to the making of said contract, and during the drafting thereof, Raymond T. Heilpern, Esq., acted as counsel for said United States Plywood Corporation and as such participated in said negotiations and in the drafting of said contract. He drafted Paragraph 10 of said contract, relating to arbitration; and it was at his instance and insistence that there was drawn and worded by him and inserted in said Paragraph 10, the clause at the end thereof which reads as follows:

"... but nothing herein shall be deemed to preclude either party from seeking injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement."

During said negotiations prior to the commencement of this action, concerning said controversy, said Raymond T. Heilpern, Esq., among others, acted as counsel for defendants, and A. W. Bruner, Esq., among others, acted as counsel for plaintiffs. On or shortly prior to August 4, 1949, there was received by the office of said A. W. Bruner, Esq., a letter from said Raymond T. Heilpern, Esq., concerning the said matter in controversy, which letter, in the absence of said A. W. Bruner, Esq., from his office, was immediately exhibited and referred to this affiant by an associate of said A. W. Bruner, Esq. Said letter is in words and figures as follows:



“Judge A. W. Bruner  
Bruner & Gilmore, Esqs.  
San Leandro, Calif.

Dear Judge Bruner:

Your letter of July 21, 1949 to Shasta Plywood Corporation has been referred to me.

As you may know, I participated in the negotiations leading to the making of the agreement of December 9, 1947, between Hudson Lumber Company and United States Plywood Corporation. In my opinion, the statements submitted by Shasta Plywood Corporation, pursuant to the contract, and the audit of Arthur Anderson & Co. were correctly prepared in conformity with the provisions of the agreement.

Further, pursuant to paragraph “3” of the contract with Hudson Lumber Company, the determination of the cost of logs by Arthur Andersen & Co. is final and binding upon both parties to the agreement. Under the circumstances, I must insist, on behalf of my client, that Hudson Lumber Company make prompt payment of the balance due, representing the difference between the amount actually paid by it and the contract price of the logs delivered, as established by the audit made by Arthur Andersen & Co.

If the parties to the agreement are unable to settle amicably their differences, such dispute can, of course, be arbitrated as provided in paragraph “10” of the contract. However, pending such arbitration,

it is expected that your client will pay all invoices at the time and in the manner specified in the contract.

Very truly yours,

/s/ RAYMOND T. HEILPERN.”

RTH:FP

Immediately following receipt of such letter, plaintiff's counsel herein prepared and filed on August 4, 1949, the Complaint in this action.

/s/ FRANCIS M. NEALL.

Subscribed and sworn to before me this 13th day of October, 1949.

[Seal] /s/ JACQUELINE DITTO,  
Notary Public in and for the County of Alameda,  
State of California.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 17, 1949.

[Title of District Court and Cause.]

State of New York,  
City of New York, County of New York—ss.

Raymond T. Heilpern, being duly sworn, deposes and says:

That he is an attorney-at-law, duly admitted to practice in the Courts of the State of New York, and has his office at No. 225 Broadway, in the Borough of Manhattan, City of New York. That he is the Raymond T. Heilpern referred to in the affidavit of Francis M. Neall submitted in opposition to the above-named defendants' application for a stay.

It is true, as stated in said affidavit, that deponent, in conjunction with said Francis Neall, drafted the contract between United States Plywood Corporation and Hudson Lumber Company, dated December 9, 1947, which is the subject matter of this action. The facts, however, with reference to the precise language contained in paragraph "10" of said agreement relating to arbitration, are materially at variance with those set forth in Mr. Neall's affidavit.

Deponent has in his files the first draft of said agreement. The arbitration clause, as contained in the draft, was originally dictated by deponent and it stopped with the phrase "pursuant to the rules of the American Arbitration Association as then in effect". A copy of this original draft was delivered by deponent to Mr. Neall during the course of the negotiations and Mr. Neall submitted it.

according to his then statement to deponent, to Mr. Eugene Untermeyer, counsel in New York for Eagle Pencil Company and the plaintiff, Hudson Lumber Company; Eagle Pencil Company, directly or indirectly, according to the information furnished to deponent, controls the Hudson Lumber Company.

A day or so after the preparation of the original draft, Mr. Neall came to deponent's office with his copy of the draft, and certain amendments thereto which he said had been proposed by Mr. Untermeyer. Included in those amendments was the addition to paragraph "10," reading as follows:

"but nothing herein shall be deemed to preclude either party from seeking injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement."

This provision, which appears in shorthand on the first draft of the agreement, which is in deponent's possession, was dictated by Mr. Neall in deponent's office to deponent's then secretary.

In justification for this modification of the arbitration clause, Mr. Neall pointed out that Hudson Lumber Company was going to build a large mill at Anderson to manufacture the slats from the cedar logs and that their operations would be wholly dependent upon continued deliveries of cedar logs from the timber controlled by United States Plywood Corporation. He stated that if United States Plywood Corporation were to divert the cedar logs from the plant of Hudson Lumber Company it would suffer irreparable injury and that arbitration

proceedings would not afford an adequate remedy to prevent such injury. He therefore asked for the inclusion in the arbitration clause of a provision for the right to secure injunctive relief to prevent irreparable injury.

As stated above, the language of this modifying clause to the arbitration provision was suggested by Mr. Neall, purportedly as the result of his conference with his attorney, Mr. Eugene Untermeyer, and was not deponent's.

/s/ RAYMOND T. HEILPERN.

Sworn to before me, this 14th day of October, 1949.

/s/ DEBORAH NEMETZ,

Notary Public, State of New York, Residing in New York County.

Commission Expires March 30, 1950.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 17, 1949.

[Title of District Court and Cause.]

### ORDER

Defendant's Motions to Dismiss and to Stay Proceedings having been briefed, argued, and submitted for ruling,

It Is Ordered that the Motion to Dismiss be and the same hereby is Denied, and Motion to Stay be and the same hereby is Granted, pending arbitration by the parties in accordance with the provisions of the contract in dispute.

Date:

/s/ GEORGE B. HARRIS,  
U. S. District Judge.

Evans v. Hudson Coal Co., 165 Fed. 2d 970;  
Shanferoke Co. v. Westchester Co., 293 U. S. 449;  
Kulukundis v. Amtorg Trading Corp., 126 Fed. 2d.  
978.

[Endorsed]: Filed Nov. 9, 1949.



[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

Notice is hereby given that Hudson Lumber Company, a Delaware corporation, and Elkins Sawmill Incorporated, a California corporation, plaintiffs above named, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that portion of the Order made and filed herein on November 9, 1949, granting the defendants' Motion to Stay proceedings, said portion of said Order being that portion providing as follows:

"It Is Ordered that the . . . Motion to Stay be, and the same hereby is, Granted, pending arbitration by the parties in accordance with the provisions of the contract in dispute."

Dated: December 1, 1949.

BRUNER & GILMORE,  
McKEE, TASHEIRA and  
WAHRHAFTIG,

/s/ RIDLEY STONE,

Attorneys for Appellants, Hudson Lumber Company, a Delaware corporation, and Elkins Sawmill Incorporated, a California corporation.

[Endorsed]: Filed December 1, 1949.

[Title of District Court and Cause.]

APPELLANTS' DESIGNATION OF PORTIONS OF RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN RECORD ON APPEAL

The Appellants in the above-entitled action, Hudson Lumber Company, a Delaware corporation, and Elkins Sawmill Incorporated, a California corporation, designate the following portions of the record, proceedings and evidence to be contained in the record on appeal in the above-entitled action:

1) Complaint for Declaratory Relief and for Injunction filed herein with the Petition for Removal of the Cause on August 26, 1949, and attached to said Petition for Removal of the Cause as Exhibit 1 thereto, together with the exhibits attached to said Complaint designated Exhibit "A" and Exhibit "B."

2) Motion to Dismiss or in the Alternative to Stay Action, together with Notice of said Motion attached thereto, and together with the Affidavit of M. A. Marquis dated August 29, 1949, attached thereto; all thereof having been filed herein on September 1, 1949.

3) Affidavit of Francis M. Neall in opposition to Motion of Defendants to Dismiss or Stay, dated October 13, 1949, filed herein on October 17, 1949.

4) Affidavit of Raymond T. Heilpern, dated Oc-

tober 14, 1949, and filed herein on October 17, 1949.

5) Order of the above-entitled Court denying Motion to Dismiss and Granting Motion to Stay, made and filed herein on November 9, 1949.

### STATEMENT OF POINTS

A) The issues involved in this action are not "referable to arbitration under an agreement in writing for such arbitration" within the provisions of Section 3 of the United States Arbitration Act (9 U.S.C.A. Sect. 3), in that the arbitration clause found in Paragraph 10 of the contract agreement attached as Exhibit A to the Complaint saves to the parties thereto the right to seek "injunctive relief to prevent irreparable injury by reason of a claimed breach" of said contract.

B) This action is brought seeking "injunctive relief to prevent irreparable injury by reason of a claimed breach" of said contract.

C) The Defendants and Appellees have waived whatever right they may have had to insist on prior arbitration as a condition precedent to litigation.

D) The Court erred in staying the action pending arbitration by the parties in the face of said saving clause reserving to the parties the right to seek "injunctive relief to prevent irreparable in-

jury by reason of a claimed breach" and in the face of said waiver by defendants and appellees.

Dated: December 2, 1949.

BRUNER & GILMORE.  
McKEE, TASHEIRA &  
WAHRHAFTIG.

/s/ RIDLEY STONE,

Attorneys for Appellants: Hudson Lumber Company, a Delaware Corporation, and Elkins Sawmill Incorporated, a California Corporation.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 3, 1949.

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD  
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellants, to wit:

Petition for Removal of Civil Action from the Superior Court of the State of California, in and for the County of Alameda, to the District Court of the United States, for the Northern District of

California, Southern Division, Contains a copy of Summons and Complaint for Declaratory Relief and for Injunction—Exhibit 1—and Copy of Contract—Exhibit “A” to Exhibit 1 and copy of provision relating to merchantability of logs—Exhibit “B” to Exhibit 1.

Motion to Dismiss or in Alternative to Stay Action.

Affidavit of Francis M. Neall in Opposition to Motion of Defendants to Dismiss or Stay.

Affidavit of Raymond T. Heilpern.

Order Denying Motion to Dismiss and Granting Motion to Stay.

Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Appellants’ Designation of Portions of Record, Proceedings and Evidence to Be Contained in Record on Appeal and Statement of Points.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 15th day of December, A.D. 1949.

C. W. CALBREATH,  
Clerk.

[Seal] By /s/ M. E. VAN BUREN,  
Deputy Clerk.

[Endorsed]: No. 12429. United States Court of Appeals for the Ninth Circuit. Hudson Lumber Company, a Corporation, and Elkins Sawmill Incorporated, Appellants, vs. United States Plywood Corporation and Shasta Plywood, Inc., Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed December 15, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the  
Ninth Circuit.



In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 12429

HUDSON LUMBER COMPANY, et al.,  
Appellants.

vs.

UNITED STATES PLYWOOD CORPORA-  
TION, et al.,  
Appellees.

STATEMENT OF POINTS AND DESIGNA-  
TION OF RECORD (RULE 19 (6))

To the Clerk of the above-entitled Court:

Agreeably to the provisions of your Rule 19 (6), the Appellants Hudson Lumber Company and Elkins Sawmill Incorporated, hereby submit the following statement of the points on which Appellants intend to rely, and the following designation of all of the record which is material to the consideration of the appeal:

Statement of Points

(Question: Where parties to a contract for the sale of incense cedar logs dispute its meaning as to the computation of the price, and the purchaser sued for declaratory relief and to enjoin the seller from cancelling the contract or from bringing other actions, or attempting to arbitrate, alleging that purchaser faces the dilemma of either paying the

substantially larger sums claimed by seller or running the risk that seller will cancel or refuse performance, to purchaser's irreparable injury, on the claim that purchaser has breached the contract: Was the District Court right in staying the action pending arbitration, on the basis of the contract provision requiring arbitration of all disputes thereunder, but further providing that "nothing herein shall be deemed to preclude either party from seeking injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement"?)

Points:

1. The issues involved in this action are not "referable to arbitration under an agreement in writing for such arbitration" within the provisions of 9 U. S. C. A. Sect. 3, because the contract saves to the parties thereto the right to seek "injunctive relief to prevent irreparable injury by reason of a claimed breach" of said contract.

2. This action is brought seeking "injunctive relief to prevent irreparable injury by reason of a claimed breach" of said contract;

(a) Unless the Appellants continue to pay the substantially larger sums demanded by the Appellees, the Appellants fear that the Appellees will purport to cancel or refuse performance contending that Appellants have breached the contract;

(b) Such cancellation or refusal of performance, would, if Appellees are wrong in their construction of the contract, constitute a breach on their part

by Appellees and would cause irreparable injury to the Appellants;

(c) Cancellation or refusal of performance under such circumstances by the Appellees will cause the loss of a substantial investment and an assured supply of cedar timber; damages would be difficult to ascertain and inadequate; and multiplicity of actions and proceedings may result unless the relief sought by Appellants is granted; all to Appellants' irreparable injury;

(d) The actions for "injunctive relief" excluded by the contract from the arbitration provision include the usual equitable remedies of mandatory or prohibitive injunction and declaratory relief incidental thereto.

3. The Appellees have waived whatever right they may have claimed to insist upon prior arbitration as a condition precedent to this litigation.

4. In determining whether the issues are "referable to arbitration under an agreement in writing for such arbitration" and in determining the rights and duties of the parties, the contract is to be construed under and governed by the laws of California, by reason of its express provisions.

5. The District Court erred in staying the action pending arbitration by the parties, in the face of the saving clause reserving to the parties the right to seek "injunctive relief to prevent irreparable injury by reason of a claimed breach", and in the face of such waiver by Appellees.

## Designation of Record.

The whole of the certified typewritten Transcript of Record filed in the above entitled Court on December 15, 1949.

Dated: December 19, 1949.

BRUNER AND GILMORE,  
McKEE, TASHEIRA &  
WAHRHAFTIG,

/s/ RIDLEY STONE,

Attorneys for Appellants Hudson Lumber Company, a Delaware corporation, and Elkins Sawmill Incorporated, a California corporation.

Affidavit of service by mail attached.

[Endorsed]: Filed December 20, 1949.